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No. 96-532

In the Supreme Court of the United States

OCTOBER TERM, 1996

FELIX APONTE-VELAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lack of a verbatim transcript of the prosecution's rebuttal closing argument requires reversal of petitioner's conviction.

2. Whether the Due Process Clause required the prosecution to correct the allegedly false testimony of one of its witnesses when the prosecution neither elicited nor relied upon the testimony, and defense counsel was aware of the inconsistency and exposed it during cross-examination.

3. Whether the district court's failure to instruct the jury to draw no adverse inferences from petitioner's failure to testify required reversal under the plain error rule.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 80 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1996. A petition for rehearing was denied on May 2, 1996. Pet. App. C1-C2. On July 23, 1996, Justice Souter granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including September 30, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846; conspiring to import cocaine, in violation of 21 U.S.C. 963; and importing cocaine, in violation of 21 U.S.C. 952.[1] The district court sentenced petitioner to a term of 188 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A25; Gov't C.A. Br. 4-5, 6.

1. In September 1991, FBI Agent Carlos Osorio arrived in Puerto Rico with a confidential informant. Manuel Aponte and Carmelo Pulliza met Osorio and the informant at the airport. They took Osorio to Manuel Aponte's apartment, where Jorge Hernandez Miller and Wilfredo Caicedo were planning the drug importation operation. Gov't C.A. Br. 10-12, 14. Later that month, petitioner, Pulliza, Caicedo, and Miller met at petitioner's home to plan the offloading of 596 kilograms of cocaine. Petitioner arranged for fishermen to recover the drugs from the sea. After the drugs were delivered to the stash house, they were taken to petitioner's home and, later, moved to San Juan. Petitioner was paid with 45 kilograms of cocaine for himself and the fishermen. *Id.* at 11-14.

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[1] Petitioner and 30 other defendants were charged with various drug offenses in a 48-count superseding indictment. Petitioner was tried with two co-defendants, Carmelo Pulliza and Rodrigo Brand. Co-defendants Manuel Aponte, Wilfredo Caicedo, and Jorge Hernandez Miller pleaded guilty and testified for the government at the trial. Both Pulliza and Brand were convicted of drug offenses with petitioner. Gov't C.A. Br. 2, 5-7, 11-12, 14.

On September 27, 1991, Manuel Aponte and Pulliza flew from San Juan to Miami with some of the cocaine in their suitcases. Caicedo took delivery of the cocaine, and the couriers returned to Puerto Rico. The next day, Manuel Aponte and Roberto Montanez transported additional suitcases of cocaine to Miami. Gov't C.A. Br. 12. Agent Osorio identified Manuel as he delivered the drugs to Caicedo, and both Manuel and Caicedo were arrested. *Id.* at 11, 13. Manuel and Caicedo became cooperating defendants and both provided information implicating petitioner in the drug importation scheme. *Id.* at 11-13.

2. a. At trial, co-defendant Jorge Hernandez Miller testified about petitioner's role in the drug offenses. Gov't C.A. Br. 14. Before trial, the government had informed the defense and the district court that Miller had stated during plea negotiations that he was pleading guilty because he believed that he was gong to be implicated in murders, "and * * * he wanted to clear the record that in fact he did not participate in those murders." Pet. App. A12. In a pre-trial interview, Miller also told defense counsel that he was afraid "the government . . . [was] going to bring a massacre against him, a murder against him," but that he had not committed murder. *Ibid.*[2]

During the trial, Miller's plea agreement was admitted into evidence. It did not mention murders.

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[2] The defense had received four days of unlimited access to Miller before trial and several more days after trial began, and were given notes taken by government agents during the government's interviews. Pet. App. A11. In a pre-trial ruling, the court strictly prohibited the defendants from introducing extrinsic evidence about the alleged murders and limited cross-examination on those alleged crimes to challenging Miller's motivation for entering the plea agreement. *Ibid.*

Pet. App. A12. On cross-examination, defense counsel tried to elicit an admission from Miller that he cooperated with the government to "minimize the severity of the accusations against himself" and, in particular, to avoid being implicated in, or charged with, the murders. Miller repeatedly denied such a motive, professing only a desire to "repent" and "tell the truth." *Id.* at A12-A13. Miller conceded, however, that under the plea agreement, "if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them," and "would be sentenced to fewer years." *Id.* at A14.

b. Petitioner did not testify at his trial. He requested that the jury be instructed that:

> Under the law, a defendants [sic] does not need to testify, since it is the Government who must prove her [sic] guilty beyond a reasonable doubt. No presumption or inference of guilt may be made or drawn.

Pet. App. A18. The district court declined to give petitioner's proposed instruction, and instead advised the jury that:

> Each defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. *The government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so, you must return a not-guilty verdict.*

Id. at A15-A16. Petitioner did not object to that instruction, or to the denial of his requested instruction. *Id.* at A14-A15, A18.

3. Following petitioner's sentencing, new counsel entered the case to represent him on appeal. After

counsel sought unsuccessfully to obtain a complete trial transcript, the district court determined that certain portions of the transcript—the closing arguments and the court's jury charge—had been irretrievably lost. Pet. App. A2-A4 & n.2. Petitioner and his co-defendants moved in the court of appeals for summary reversal. The court of appeals denied the motion without prejudice, but ordered the district court to attempt to recreate an adequate record for appeal or, if it was unable to do so, to determine whether petitioner and his co-defendants would be prejudiced by the remaining omissions from the record. *Id.* at A3.

The district court reconstructed its jury charge and located a transcript of co-defendant Pulliza's entire closing argument and a "substantial portion" of petitioner's closing. Trial counsel for co-defendant Brand supplied the court with partial notes prepared for his closing argument, and assured the court that it would be impossible to recreate the actual closing argument. The government filed what the parties agreed was a "reasonable recreation" of its principal closing argument, and a reconstruction of its rebuttal argument, which petitioner and his co-defendants viewed as inadequate. Pet. App. A3, B2-B4. All parties agreed that no contemporaneous objections had been raised during the segments of the trial for which the transcript was incomplete. *Id.* at A3. The district court certified that the record had been reconstructed

> as best the court and the parties could. The defendants have not shown any specific prejudice arising from the absence of the trial transcript other than the inconvenience of not having the precise

> text . . . for purposes of developing argument on appeal on the basis of clear error.

Ibid.; *id.* at B4-B5.

4. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A25. The court ruled that, although the absence of a complete trial transcript violated the Court Reporter Act, 28 U.S.C. 753(b), the Act does not require a new trial in the absence of "specific prejudice" to the defendant's ability to perfect an appeal. Pet. App. A6-A7. The court of appeals ruled that no "specific prejudice" had been demonstrated in this case. Petitioner conceded that the government's reconstruction of its main closing argument was "substantially accurate" and that no plain error occurred during the defendants' closings. With respect to the government's rebuttal argument, the court was "hard-pressed to conceive what sort of illegitimate argument could have been made during these few moments" that would have impermissibly prejudiced petitioner, especially where petitioner and the other defendants could recall no such error based on the government's reconstruction. *Id.* at A7. Furthermore, in light of the quantity and strength of the evidence against petitioner, the court of appeals was "not persuaded that any deficiency [in the government's rebuttal] could have risen to a miscarriage of justice." *Id.* at A7-A8.

The court of appeals also ruled (Pet. App. A12-A14) that the government was not required to correct Miller's denial that his testimony was motivated by a desire to avoid being implicated in, or charged with, certain murders. The district court had already excluded testimony about the murders as unduly prejudicial and, in any event, Miller had conceded

during cross-examination that his testimony was motivated in part by a desire to avoid indictment and to obtain a more lenient sentence. That testimony constituted a "sufficient acknowledgement that [Miller's] claim of rebirth was less than genuine" to relieve the government of any duty to go further. *Id.* at A14.

Finally, the court of appeals rejected (Pet. App. A18-A23) petitioner's claim that the district court's failure to instruct the jury that it could draw no adverse inference from petitioner's exercise of his right to remain silent was plain error that required reversal under Fed. R. Crim. P. 52(b). Because the uncontradicted evidence against petitioner was overwhelming, the court concluded that the instructional error did not "seriously affect[] the fairness of the proceedings." Pet. App. A23.[3]

ARGUMENT

1. Petitioner contends (Pet. 11-14) that his conviction must be reversed because of the absence of a transcription of the prosecution's rebuttal argument, and that the court of appeals' contrary decision conflicts with the rulings of other courts of appeals. Because petitioner's claim would fail under the standard applied by any court of appeals, this Court's

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[3] Petitioner also argued that the district court erred in denying a continuance and formulating its instruction on reasonable doubt, and that the prosecution violated the Double Jeopardy Clause. The court of appeals rejected each of those arguments, and petitioner does not renew them here. Pet. App. A8-A12, A14-A18, A23-A25.

review is not warranted.[4]

The courts of appeals are in agreement, and petitioner does not contend otherwise, that the failure of a court reporter to record all trial proceedings verbatim does not require automatic reversal of a conviction. See *United States* v. *Pace*, 10 F.3d 1106, 1124 (5th Cir. 1993), cert. denied, 114 S. Ct. 2180 (1994); *United States* v. *Preciado-Cordobas*, 981 F.2d 1206, 1212 (11th Cir. 1993); *United States* v. *Sierra*, 981 F.2d 123, 125 (3d Cir. 1992), cert. denied, 508 U.S. 967 (1993); *United States* v. *Antoine*, 906 F.2d 1379, 1381 (9th Cir.), cert. denied, 498 U.S. 963 (1990); *United States* v. *Gillis*, 773 F.2d 549, 554 (4th Cir. 1985); *United States* v. *Gallo*, 763 F.2d 1504, 1530 (1985), amended, 774 F.2d 106 (6th Cir. 1985), cert. denied, 474 U.S. 1068 and 1069, 475 U.S. 1017 (1986).

The majority of courts, including the court of appeals here, require the defendant to demonstrate "specific prejudice" to the defendant's ability to perfect an appeal. See *Antoine*, 906 F.2d at 1381; *Gillis*, 773 F.2d at 554; *Gallo*, 763 F.2d at 1530-1531; see also *Sierra*, 981 F.2d at 125. The Fifth and Eleventh Circuits also generally require a showing of specific prejudice. *Preciado-Cordobas*, 981 F.2d at 1212-1213; *Commercial Credit Equipment Corp.* v. *L & A Contracting Co.*, 549 F.2d 979, 980 (5th Cir. 1977). When the defendant is represented by new counsel on

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[4] Section 753(b) of Title 28, provides, in relevant part:

> Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method * * *. Proceedings to be recorded include (1) all proceedings in criminal cases had in open court.

appeal, however, the Fifth and Eleventh Circuits will reverse if the omission is "substantial and significant." *Preciado-Cordobas*, 981 F.2d at 1212; *United States* v. *Selva*, 559 F.2d 1303, 1306 (5th Cir. 1977).[5]

These different articulations of the governing standard do not warrant further review of this case because petitioner cannot prevail under either standard. The only relevant portion of the transcript that is missing is the prosecution's rebuttal argument.[6] The government submitted the prosecutor's attempted recreation of his rebuttal argument. Although petitioner objects that the reconstruction is inadequate,

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[5] The difference between the tests may be more semantic than substantive. At least two of the courts that apply the "specific prejudice" test nevertheless consider the presence of new counsel on appeal to be a "significant factor" in assessing prejudice. See *Sierra*, 981 F.2d at 126; *Antoine*, 906 F.2d at 1381.

[6] Although petitioner also notes that the other closing arguments and the jury charge were omitted, petitioner concedes that those portions have been "adequately reconstructed." Pet. 13 n.5; see also Pet. App. A7. Where the record has been reconstructed through competent substitute materials, a new trial is unnecessary. *Mayer* v. *City of Chicago*, 404 U.S. 189, 194 (1971) (State must afford indigent defendants only a "record of sufficient completeness to permit proper consideration of his claims" on appeal); *Norvell* v. *Illinois*, 373 U.S. 420, 424 (1963) (when through no fault of the prosecution, a transcript is unavailable, "some practical accommodation must be made"); *Draper* v. *Washington*, 372 U.S. 487, 495-496 (1963); *United States* v. *Cashwell*, 950 F.2d 699, 703-704 (11th Cir. 1992). Petitioner also contends that the testimony of certain trial witnesses was omitted. That claim, however, was not brought to the attention of the district court or the court of appeals. Pet. App. A4 n.2, A7. In any event, petitioner concedes that this testimony "does not seem to have been critical." Pet. 13 n.5.

he concedes that none of the three defendants, himself included, objected to any aspect of the rebuttal argument, and he identifies no particular aspect of the reconstructed rebuttal that triggers concern. Instead, petitioner seeks automatic reversal based solely on the court reporter's failure to transcribe rebuttal closing argument and the speculation that plain error might have occurred. That argument fails to satisfy the "substantial and significant" test:

> Mere speculation, entirely unsupported or contradicted by the record, that error may have been committed during an unrecorded part of the trial simply is not enough to support a finding that omissions are substantial and significant.

Preciado-Cordobas, 981 F.2d at 1214 (partial omission of closing arguments does not warrant reversal); see also *United States* v. *Stefan*, 784 F.2d 1093, 1102 (11th Cir.) (one hour and forty-five minute gap not a "substantial and significant omission" even though omitted bench conference was a "pivotal point in the case"; listing types of omissions that would merit a new trial, but not including rebuttal argument), cert. denied, 479 U.S. 855 and 1009 (1986); *United States* v. *Colmenares-Hernandez*, 659 F.2d 39, 43 (5th Cir.) (omission of testimony of government's rebuttal witnesses not a "substantial and significant omission of the transcript justifying reversal"), cert. denied, 454 U.S. 1127 (1981); *Selva*, 559 F.2d at 1306 n.5 (while omission of all closing arguments warrants reversal, smaller gaps in transcript may not).[7]

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[7] See also *Bransford* v. *Brown*, 806 F.2d 83, 86 (6th Cir. 1986) (petitioner must present more than gross speculation that missing transcripts were necessary to a fair appeal), cert. denied, 481 U.S. 1056 (1987). Petitioner's reliance on *Hardy* v.

Moreover, because the evidence of petitioner's guilt was overwhelming, see Pet. App. A7-A8, A23, the court of appeals reasonably concluded that, despite any "imaginable error" that might have occurred during rebuttal, there was no substantial chance that the jury would have acquitted and thus there was no plain error. *Id.* at A8; see also *Preciado-Cordobas*, 981 F.2d at 1214-1215 (under "substantial and significant" test, omission was harmless in light of overwhelming evidence of defendant's guilt).

2. Petitioner also contends (Pet. 15-21) that the Due Process Clause required the prosecution to correct the allegedly false testimony of its witness, Jorge Hernandez Miller, about his motivation for testifying, even though the testimony was not elicited or relied upon by the prosecution, and defense counsel was aware of the inconsistency and exposed it during cross-examination. The court of appeals correctly rejected that fact-bound claim, and its decision is not in conflict with any decision of this Court or of other courts of appeals.

The prosecution's knowing failure to correct false testimony violates the Due Process Clause when the false testimony is material and thus reasonably could have affected the judgment of the jury. *Napue* v. *Illinois*, 360 U.S. 264, 269-271 (1959). But no such violation occurred in this case because the govern-

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United States, 375 U.S. 277 (1964), is misplaced. *Hardy* ruled that indigent defendants must be provided the same access to trial transcripts as non-indigent defendants. *Id.* at 279-282. This case does not involve disparate treatment between paying defendants (like petitioner) and *in forma pauperis* defendants. Rather, it involves the distinct question of whether reversal is required when the only transcript that can be reconstructed is less than a verbatim account.

ment fully disclosed the impeachment evidence to the defense; the defense exploited that information in cross-examination; and the witness's admissions during that cross-examination revealed the substance of the facts that the witness had allegedly concealed.

When Miller agreed to testify on behalf of the government, the prosecution informed the defense and the district court that Miller had stated that he was pleading guilty because "he thought that he was going to be imputed with some murders * * * which he denies, and * * * [that] he wanted to clear the record that in fact he did not participate in those murders." Pet. App. A12.[8] Before trial, the district court ruled that evidence of the murders was too prejudicial to be admitted, but that the defense could refer to the murders in cross-examining Miller about his motives to enter into the plea agreement. *Id.* at A11. On cross-examination, Miller claimed that he was testifying because he desired to "repent" and "tell the truth." *Id.* at A13. Under lengthy questioning, however, Miller acknowledged that other factors influenced his decision to testify. See *Id.* at A14 (Miller concedes that the plea agreement meant that "if I speak about things of which I have knowledge or in which I have taken part, I wouldn't be indicted for them" and "would be sentenced to fewer years").[9]

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[8] Miller separately and additionally advised defense counsel that he was afraid "the government . . . [was] going to bring a massacre against him, a murder against him, but he also stated to [defense counsel] that in fact he did not do that." Pet. App. A12.

[9] See also C.A. App. 194-195 (Miller admits that he is testifying because "I have three daughters and a wife I love" and "I would like to return to my family before too many years go by"); *id.* at 195 ("I was told quite clear that if I testified I

That cross-examination thus effectively exposed that Miller's motives to cooperate included avoiding prosecution on crimes he revealed as well as obtaining a more lenient sentence. At the conclusion of cross-examination, defense counsel "made no indication to the court" that the government was under an obligation to clarify Miller's statements further and, instead, "indicated satisfaction with coverage of the issue." *Id.* at A13 n.7.

This, accordingly, is not a case in which the government elicited, adopted, or affirmatively used or argued perjured testimony. Nor did the government suppress or withhold impeachment evidence; to the contrary, the prosecution disclosed Miller's testimonial motive to the defense and "defense counsel knew virtually as much about that subject as the prosecution did." *Spaziano* v. *Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994), cert. denied, 115 S. Ct. 911 (1995). Under these circumstances, the court of appeals correctly ruled that the government had no obligation to "correct" the record by confirming what cross-examination had already exposed. Cf. *Gilday* v. *Callahan*, 59 F.3d 257, 268 (1st Cir. 1995) (no error where, even though witness denied existence of deal with government, his acknowledgement at trial of "a generalized expectation of leniency" served to disclose possible motivation to testify favorably for government), cert. denied, 116 S. Ct. 1269 (1996); *Tejada*

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would be sentenced to fewer years."); *id.* at 197.1 (in response to counsel's question that "as part of your cooperation, they would not prosecute you for those things that you told them about over which they had no independent evidence?", Miller responds "That is right."); *id.* at 197.2 (Miller states that testimony was, in part, "[f]or my wife"); Gov't C.A. Br. 30-33 (further outlining cross-examination testimony).

v. *Dugger*, 941 F.2d 1551, 1557 (11th Cir. 1991) (where defense knew of and exposed inconsistencies in testimony on cross-examination, false testimony could not have affected jury's verdict), cert. denied, 502 U.S. 1105 (1992).[10]

3. Finally, petitioner contends (Pet. 21-26) that the court of appeals abused its discretion when it declined to reverse his conviction because of the district court's failure to instruct the jury that it could draw no adverse inference from petitioner's failure to testify. The district court's failure to give the "no-adverse-inference" instruction requested by petitioner was erroneous. *Carter* v. *Kentucky*, 450 U.S. 288, 300 (1981); see also *James* v. *Kentucky*, 466 U.S. 341, 344 (1984) (same). Because petitioner did not object to the jury instructions, however, review is limited to plain error under Fed. R. Crim P. 52(b). *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Under that standard, the defendant must show the existence of an obvious error that affected substantial rights. Even then, the court of appeals retains discretion whether to correct the error, and it should

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[10] Petitioner's reliance (Pet. 18-21) on *United States* v. *Wallach*, 935 F.2d 445 (2d Cir. 1991); *United States* v. *Foster*, 874 F.2d 491 (8th Cir. 1988); and *United States* v. *Iverson*, 648 F.2d 737 (D.C. Cir. 1981), is misplaced. In *Wallach* and *Foster*, the government both elicited the perjured testimony and relied upon it in closing. *Wallach*, 935 F.2d at 455, 458-459; *Foster*, 874 F.2d at 494-495. Furthermore, in *Foster*, the prosecutor misrepresented the undisclosed fact to the court in responding to a jury question. 874 F.2d at 495. *Iverson* simply remanded for a hearing in the district court concerning defense counsel's knowledge of undisclosed information, without finding any due process violation, in a case where the witness's perjury was not exposed during cross-examination and the prosecution relied on the false information at summation. 648 F.2d at 739 & n.10.

not exercise that discretion unless the error "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 734, 736.[11]

The court of appeals correctly exercised its discretion here. It concluded that "the uncontradicted evidence against [petitioner], from the testimony of several co-conspirators involved in various aspects of the scheme, was overwhelming," and that the jury would have rendered the same verdict "regardless of the [district court's instructional] error." Pet. App. A23. In those circumstances, the instructional error did not "seriously affect[] the fairness of the proceedings," *ibid.*, and the court of appeals did not abuse its discretion in declining to reverse. Petitioner identifies no decision that conflicts with that holding.

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[11] This Court has not yet determined whether, if the objection is properly preserved, the court's failure to provide a no-adverse-influence instruction is amenable to "harmless error" review. See *James*, 466 U.S. at 351. Because this case arises under a plain error standard of review, that issue is not presented. In any event, petitioner's principal claim (Pet. 23-25) seems to be only that the error was not harmless on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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